

December 15, 2005

**VIA ELECTRONIC COMMENT FILING SYSTEM**

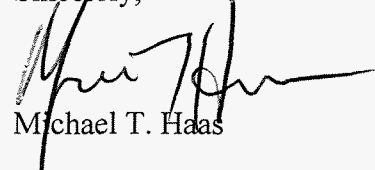
Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C.

Re: Application for Consent To Transfer Control of WilTel Communications, LLC and Vyvx, LLC From Leucadia National Corporation To Level 3 Communications, LLC, IB 05-318, DA 05-2963, File Nos. ITC-T/C-20051102-00460, ITC-T/C-20051102-00461, SCL-T/C-20051102-00028, SCL-MOD-20051020-00029, SES-T/C-20051102-01503, SES-T/C-20051102-01504, SES-T/C-20051102-01505, SES-T/C-20051102-01506

Dear Secretary Dortch:

It has come to my attention that a page was missing from the declaration attached to the comments filed yesterday, December 14, 2005, by XO Communications, Inc. pertaining to the above proceeding and file numbers. Please accept this corrected filing. Feel free to contact me should you have any questions regarding this filing.

Sincerely,



Michael T. Haas

Enclosure

cc: James Ball, FCC (james.ball@fcc.gov)  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

Application for Consent	)	IB 05-318
To Transfer Control of WilTel	)	DA 05-2963
Communications, LLC and Vyvx, LLC	)	File Nos. ITC-T/C-20051102-00460,
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	)	T/C-20051102-01506

**Comments of XO Communications, Inc.**

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December 14, 2005

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**Comments of XO Communications, Inc.**

XO Communications, Inc. (“XO”), by its attorneys, submits these comments regarding the acquisition of WilTel Communications, LLC by Level 3 Communications, LLC (“Level 3”).

**Introduction and Summary**

Level 3 is one of the largest remaining non-ILEC global communications providers, operating 23,000 miles of network to provide Internet backbone and high bandwidth services to large customers and other network operators. *See* Public Notice DA 05-2963 (rel. Nov. 14, 2005). Through this transaction, Level 3 seeks to subsume WilTel, owner and operator of a large, international fiber-optic network and one of Level 3’s primary competitors in the delivery of high-capacity wavelength services in the international private line market. In its well-publicized de-peering dispute with Cogent this fall, Level 3 demonstrated its complete willingness to leverage its position regarding public access to the Internet backbone to influence results in private contractual arrangements. After the resolution of this dispute, statements by Level 3 officials attempted to make it sound as if this conduct by Level 3 was unusual and not likely to

happen again. However, Level 3's aggressive tactics were not a unique event. And with increased size and more control over a link in the chain of the backbone, Level 3 may well resort to such tactics again in the future. Level 3's conduct raises concerns about how it operates its telecommunications networks today and how it will operate these networks after acquiring WilTel. The Commission should therefore ensure that Level 3 does not use this acquisition to engage in more hardball conduct to the detriment of Internet users and the broader public interest.

**I. The Burden Is On Level 3 To Demonstrate How Its Acquisition Serves The Public Interest**

Pursuant to sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), Level 3 must show that the proposed transfer of control of WilTel's licenses and authorizations will serve the public interest, convenience and necessity. *See Global Crossing, Ltd. and GC Acquisition Ltd., Applications for Consent to Transfer Control, Order and Authorization*, 18 FCC Rcd 20301 (2003); *Voicestream Wireless Corp., PowerTel, Inc., and Deutsche Telekom AG, Applications for Consent to Transfer Control*, Memorandum Opinion and Order, 16 FCC Rcd 9779 (2001). In addition, the Commission reviews the transaction under the Cable Landing License Act, 47 U.S.C. §§ 34-39.

The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act." *Lockheed Martin Corp. Regulus, LLC and Comsat Corp., Application for Consent to Transfer of Control*, Memorandum, Order and Authorization, 14 FCC Rcd 15816, 15821-15822 ¶12 (1999) (citing *Telecommunications, Inc. and AT&T Corp., Application for Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3169 ¶14). The analysis includes,

among other things, preserving and enhancing competition in relevant markets and accelerating the deployment of advanced services to the public. *See generally* 47 U.S.C. §§ 157, 254, 259; Section 706 of the Telecommunications Act of 1996, Pub.L. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. Sec. 157; Telecommunications Act of 1996, Preamble; *MediaOne Group, Inc. and AT&T Corp., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9821 ¶11 (2000). Recently, the Commission has also incorporated certain core principles into all of its decisions affecting the Internet. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Policy Statement, CC Docket No. 02-33, FCC 05-151, ¶5 (rel. Sept. 23, 2005) (“The Commission has a duty to preserve and promote the vibrant and open character of the Internet . . .”) (“*Internet Policy Statement*”).

The Commission’s public interest analysis may also entail assessing whether the merger will affect the quality of communications services. *See MediaOne Group*, 15 FCC Rcd at 9821 ¶11. In conducting this analysis, the Commission may consider technological and market changes and the nature, complexity, and speed of change of, as well as trends within, the communications industry. *See id.* In addition to considering whether the merger will reduce existing competition, the Commission also focuses on whether the merger will “accelerate the decline of market power by dominant firms in the relevant communications markets.” *Id.* ¶10 (citing *NYNEX Corp. and Bell Atlantic Corp., Application for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd 19986, 20035 ¶95 (1997)).

Finally, the Commission considers whether the applicant for a license has the requisite citizenship, character, financial, technical, and other qualifications. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992); *MCI Telecommunications Corp., Petition for Revocation of Authority*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

## **II. The Current Transaction Will Broaden Level 3's Ability To Engage In Conduct That Has Been Harmful To The Public Interest**

Level 3 has in the past used its market leverage to foreclose competitive entry and harm consumers, competitors, and competition. As a result of its increased size and reach, Level 3's ability and incentive to foreclose competition and disrupt Internet communications will be further entrenched, contrary to the public interest.

1. First, Level 3 has engaged in a pattern and practice of disrupting Internet peering relationships with backbone providers so as to harm competitors and the public. The Commission recently affirmed that Tier 1 Internet backbone services are a relevant product market. *See SBC Communications, Inc. and AT&T Corp., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183, ¶112 (rel. Nov. 17, 2005) ("*SBC Order*"). The public has a strong interest in unimpeded Internet communications. *See Internet Policy Statement*, ¶4 (promoting open and interconnected nature of the Internet and adopting policy to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers). The recent ILEC mega-mergers have further consolidated this market and,

significantly, eliminated the number of non-ILEC affiliated providers of these services, including AT&T and MCI.

A well-functioning Internet is highly dependent on peering arrangements among Tier 1 providers. *See, e.g.*, Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* (Sept. 2000). Of course, such arrangements are entirely discretionary. However, there is no doubt that the incentive and ability of Tier 1 backbone providers to “de-peer” and cause temporary but significant outages in international Internet communications raises significant public interest concerns for the Commission. *See SBC Order*, Statement of Commissioner Michael Copps at 2 (network outages from “de-peering” properly concern the Commission); *id.*, Statement of Commissioner Jonathan Adelstein at 2 (maintaining settlement-free peering helps protect against concentration in the Internet backbone market).

In theory, “peering and de-peering decisions are driven by [the provider’s] incentives to maximize network efficiency and lower interconnection costs.” *SBC Order* ¶129. While there are a number of factors that go into the decision whether to peer, there is a strong public interest in ensuring the process of de-peering does not disrupt or impede Internet communications. *Cf. SBC Order* n.393 (transparency of peering policies serves the public interest); *Verizon Communications Inc. and MCI, Inc., Applications for Consent to Transfer of Control*, Memorandum Opinion and Order, WC Docket 05-75, FCC 05-184, ¶133 (rel. Nov. 17, 2005) (“*Verizon Order*”). Even temporary service disruptions arising from commercial disputes are antithetical to the public interest. *Cf. GM Corp. and NewsCorp., Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 573 ¶220 (2004) (mechanism in place to reduce incentive and



ability to impose broadcast service interruptions on subscribers). Indeed, the Commission expressly took comfort in the ILEC mega-mergers when the parties committed to maintain settlement-free peering and publish their peering policies so as to protect unimpeded Internet communications. *See, e.g., SBC Order* ¶133; *Verizon Order* ¶134. In practice, there is already concern that consolidation among Tier 1 providers will accelerate the trend toward service interruptions caused by precipitous de-peering conduct. *See* Carolyn Marsan, *More Peering Clashes Seen Possible*, Network World, Oct. 24, 2005 at 33, available at <http://www.networkworld.com/news/2005/102405-peering.html> (“As the big backbones get bigger in terms of how much traffic they are running over their networks, they can play hardball with some of the smaller networks.”).

Level 3 is already one of the largest providers of Internet backbone services in the global marketplace on the basis of transited or announced address space and geographical reach. *See SBC Order* ¶115. *See also* Declaration of Randy Nicklas On Behalf of XO Communications, Inc., attached hereto, ¶3 (“Nicklas Declaration”). In the past, Level 3 had a reputation for being interested in settlement-free peering, but its recent conduct shows it has changed its tune. *See* Nicklas Declaration ¶¶2, 4-5. More recently, Level 3 has demonstrated that its de-peering decisions are driven by strategic considerations without regard to consumer harm.

The Commission is already aware that Level 3 caused widespread Internet disruption when it de-peered Cogent in a public, high-stakes “showdown” this past October. *See* Jeff Smith, *Level 3, Cogent Resolve Dispute - Feud Disrupted Internet Traffic*, Rocky Mountain News, at C3 (Oct. 29, 2005). At the time, it appeared that Level 3 was trying to use its size and leverage to force rivals to raise their downstream prices.

See Stacey Cowley, *ISP Spat Leaves Customers Disconnected*, Network World, Oct. 10, 2005 at 10, available at <http://www.networkworld.com/news/2005/101005-isps.html>. These actions left “millions of users on both networks without access to the full Internet” for several weeks. Mark Sullivan, *Level 3, Cogent Kiss & Peer Up*, [http://www.lightreading.com/document.asp?doc\\_id=83290](http://www.lightreading.com/document.asp?doc_id=83290) (Oct. 28, 2005). The parties eventually resolved the matter and Level 3 then appeared to “apologize to both sets of customers” for its conduct “in this instance.” *Id.*

But this “instance” was not a unique occurrence. Level 3 had previously engaged in the same high-stakes tactics only a few months before with XO. Specifically, Level 3 threatened to de-peer XO in September 2005 if XO would not begin to pay for interconnection, even though XO sent less traffic to Level 3 than it received in return. See Nicklas Declaration ¶4. When XO declined to alter its longstanding peering arrangement, Level 3 unilaterally shut down the connection, causing immediate harm to XO customers (and Level 3 customers). See *id.* ¶5. In light of interrupted service experienced by customers, and in order to prevent additional harm to its end-user customers as a result of the internet connections being disconnected, XO eventually relented and agreed to pay Level 3. See *id.* ¶6.

Thus, even though peering is recognized across the industry as being “mutually advantageous” to the companies involved, Level 3 has demonstrated no aversion to disrupting service if it believes it can bully others. Indeed, Level 3 publicly recognizes that de-peering causes consumer harm, even to its own customers, but it appears to consider de-peering a viable and necessary business tactic. The acquisition of WilTel’s facilities will provide Level 3 with additional opportunities to engage in this conduct.

Moreover, its power to disrupt worldwide Internet communications will be greater following this merger.

It is worth noting that the European Commission is quite focused on the key dependency that the Internet has on peering, and has for some time been monitoring the potential impact of manipulative conduct related to peering and de-peering. *See, e.g.*, European Commission Background Paper, *Internet Network Issues*, [http://europa.eu.int/information\\_society/activities/internationalrel/docs/itu/internet\\_traffic.pdf](http://europa.eu.int/information_society/activities/internationalrel/docs/itu/internet_traffic.pdf) at 8-10 (Oct. 30, 2000) (study on ITU recommendation D.50 covering international Internet connectivity); *The Economics of IP Networks - Market, Technical and Public Policy Issues Relating to Internet Traffic Exchange*, [http://europa.eu.int/information\\_society/activities/internationalrel/docs/itu/ip\\_final\\_report\\_execsum.pdf](http://europa.eu.int/information_society/activities/internationalrel/docs/itu/ip_final_report_execsum.pdf). For this reason as well, the Commission should scrutinize carefully Level 3's propensity to engage in such conduct, and the effect on such conduct of its larger size as a result of this acquisition.

2. Second, Level 3 has engaged in the serial acquisition of competitors in the international long-haul fiber optic transport marketplace while simultaneously foreclosing XO's entry into that market. *See* Nicklas Declaration ¶¶8-11. Today, the largest non-ILEC international fiber optic network providers offering OC-48 and OC-192 bandwidth speeds (so-called "wavelength services") are Level 3, Global Crossing, WilTel, Broadwing and Qwest. *See id.* ¶8. Customers for these services are dispersed globally, including cable operators, Internet service providers, large multi-national financial services companies, and other companies that transmit and store vast quantities of data, such as Google, Yahoo!, and eBay. *See id.* ¶9.

Beginning in the late 1990s, XO invested hundreds of millions of dollars in its own network, which included portions of leased fiber from Level 3, and paid millions of dollars to Level 3 to maintain the leased portion of the network. *See* Nicklas Declaration ¶10. Meanwhile, XO has also been a wavelength customer of Level 3. *See id.* As Level 3 has grown, however, it has become decidedly more hostile to competitors by interpreting its contract rights aggressively and attempting to hold XO hostage to Level 3's services. XO seeks to light fiber leased from Level 3 rather than depending on Level 3 to provide wavelength services in addition to the dark fiber. In doing so, XO seeks to lower costs and raise quality of service for its customers. *See id.* Whatever Level 3's interest in maintaining high prices in that marketplace, wavelength customers and end consumers should not be held hostage to that strategy. By acquiring WilTel, Level 3 takes another competitor off the table in this important international market and raises the possibility for additional tactics to foreclose competition.

### **III. The Commission Should Ensure Level 3's Aggrandizement Does Not Harm Consumers**

As set forth herein, there is reason to believe the instant transaction will enhance Level 3's ability to engage in targeted de-peering and its efforts to frustrate entry into the provision of Internet backbone services. Whether or not its behavior to date may be exclusively attributed to its current scale and scope, there is a clear risk that allowing Level 3 to become even larger will increase the likelihood of further disruptive conduct. For these reasons, the Commission should take a hard look at the proposed license transfers to ensure they do not give rise to a situation that is manifestly not in the public interest.

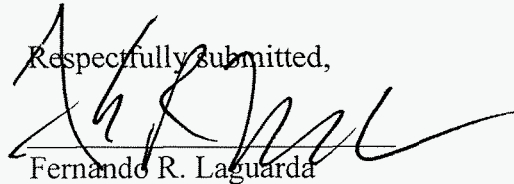
To begin, the Commission should require Level 3 to comply with the *Internet Policy Statement* as an enforceable condition of approving the merger. *Accord SBC Order* ¶211; *Verizon Order* ¶221. Although this transaction is not of the same size and scope as the ILEC mega-mergers, Level 3 has demonstrated a willingness to interfere with the reliability and stability of the Internet. The combined entity of Level 3 and WilTel will be of sufficient size and scope to further engage in unreasonable and illogical peering policies. This directly implicates the Commission’s “duty to preserve and promote the vibrant and open character of the Internet.” *Internet Policy Statement*, ¶5. For that reason, Level 3 should be required expressly to abide by the Commission’s policy.

Moreover, the Commission should require Level 3 to make public its peering policies and to maintain or re-engage in previous settlement-free peering with as many backbone providers as it has to date. *Accord SBC Order*, Appendix F; *Verizon Order*, Appendix G. Given Level 3’s demonstrated proclivities, such a requirement seems altogether reasonable. Competitors can use this information to safeguard against unwarranted service interruptions. Should Level 3 engage in further showdown negotiations, the Commission will be able to take swift action to protect consumers.

## CONCLUSION

For the foregoing reasons, the Commission should safeguard against the disruption of international Internet communications occasioned by Level 3's continued aggrandizement.

Respectfully submitted,



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	)	T/C-20051102-01506

**Declaration of Randy Nicklas On Behalf of XO Communications, Inc.**

I, Randy Nicklas, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Randy Nicklas and I am the Vice President of Engineering at XO Communications, Inc. My responsibilities include designing, implementing, and sustaining engineering of all of the XO network platforms. I make this declaration on the basis of my knowledge, information and belief.

2. For many years, based on public pronouncements of their management and working relationships with other Internet backbone engineering staff, Level 3 had a reputation for being interested in settlement-free peering.

3. Today, Level 3 is one of the biggest Internet backbone providers on the basis of transited or originated address space, per the global routing table. Its backbone has one of the broadest geographical reaches, with presence in the United States, Asia, and Europe.

4. Without any explanation or opportunity to negotiate, Level 3 threatened to de-peer<sup>1</sup> XO if XO would not begin to pay for data interconnection beginning in September of 2005. Although a significant amount of Internet traffic has been exchanged between Level 3 and XO over many years, and the volume of traffic between the companies has increased over the years, Level 3's threats came at a time when XO sent less traffic to Level 3 than it received in return. Level 3 has, traditionally, sent XO more data traffic than XO has sent Level 3. This phenomenon makes Level 3's conduct all the more confusing and frustrating.

5. XO initially declined to alter its longstanding peering arrangement with Level 3. After a warning, Level 3 shut down the connection between the two data networks. This caused immediate harm to both XO and Level 3 customers for the duration of the outage.

6. In response to complaints received nearly immediately from customers after Level 3's de-peering, XO shortly thereafter agreed to pay to peer with Level 3 in order to prevent further harm to our customers and restore connectivity to the Internet. XO's decision to agree to pay Level 3 came under duress. The decision to pay was made during the outage and required that XO verbally agree to a contract within three days or else be faced with yet another outage. This was an outcome that XO decided its customers could not and should not endure.

7. It remains unclear to XO why the Level 3 peering policy suddenly changed and why XO was mandated to pay Level 3 to peer, despite the fact that XO terminates more Level 3 internet traffic than Level 3 terminates for XO. Level 3 has not

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<sup>1</sup> Level 3 conveyed to XO that it would cease its settlement-free peering arrangement if XO did not capitulate to a pay-to-peer arrangement. When XO did not capitulate to the pay-to-peer arrangement, Level 3 disconnected the XO network.



provided any rationale for this change in its peering “policy”, nor has it provided any qualitative benchmarks that a peering partner needs to meet in order to attain settlement-free peering status.

8. Level 3 has acquired a number of its competitors in the international long-haul fiber optic transport marketplace. Today, the largest non-ILEC international fiber optic network providers offering OC-48 and OC-192 bandwidth speeds (so-called “wavelength services”) are Level 3, Global Crossing, WilTel, Broadwing, Qwest, and Sprint.

9. Customers for these services are dispersed globally, including cable operators, Internet service providers, large multi-national financial services companies, and other companies that transmit and store vast quantities of data, such as Google, Yahoo!, and eBay.

10. Beginning in the late 1990s, XO invested hundreds of millions of dollars in its own inter-city fiber optic network, which included portions of leased fiber from Level 3. XO continues to pay millions of dollars to Level 3 to maintain the leased portion of the network. XO now seeks to light its own inter-city fiber optic network, in order to lower its costs and raise the quality of service for its customers. XO also wants to increase competition for wavelength services.

11. XO has been a wavelength customer of Level 3 since 2001. Recently, Level 3 has exercised rights of first refusal in connection with the delivery of wavelength services to XO, maintaining that XO has no contractual right to light its inter-city fiber

network with its own electronics and must instead renew its agreement to purchase additional wavelength services from Level 3. By doing so, Level 3 seeks to prevent XO from entering that market and compete with Level 3.

Randy Nicklas  
Randy Nicklas

Dated: 14 December 2005

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